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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 MISS UNIVERSE, L.P., LLLP, et
4 al.,

Plaintiffs,

5 v.

15 CV 5377 (JGK)

6 UNIVISION NETWORKS & STUDIOS,
7 INC., et al.,

8 Defendants.

9 -----x

10 New York, N.Y.
October 20, 2015
4:07 p.m.

11 Before:

12 HON. JOHN G. KOELTL,

13 District Judge

14 APPEARANCES

15 LAROCCA HORNIK ROSEN GREENBERG & BLAHA LLP

16 Attorneys for Plaintiffs

17 BY: LAWRENCE S. ROSEN

-and-

18 BELKIN BURDEN WENIG & GOLDMAN, LLP

BY: JEFFREY L. GOLDMAN

19 GIBSON, DUNN & CRUTCHER, LLP

Attorneys for Defendants

20 BY: MIGUEL A. ESTRADA

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1 (Case called)

2 MR. ESTRADA: My partner, Randy Mastro, asked me to
3 apologize for not being here. He is on trial in judge front of
4 Judge Rakoff as we speak.

5 THE COURT: No need to apologize. I accept that.

6 I know people from Gibson Dunn. I've met Mr. Estrada.
7 Nothing about that affects anything that I do in the case.

8 So, Mr. Goldman, Mr. Rosen, tell me about the case,
9 please.

10 MR. ROSEN: Yes, your Honor. This is a premotion
11 conference. It's not clear to us the reasons why the defendant
12 will be seeking to dismiss the claims in the complaint.

13 Ostensibly, your Honor, our client, Miss Universe, was
14 in contract with Univision, the Spanish broadcaster, for the
15 Miss USA, Miss Universe, and other pageants. Mr. Donald Trump,
16 a member of the limited partnership that comprised
17 Miss Universe, when he declared his candidacy for President,
18 made some remarks in the opinion of the defendants that they
19 found to be somewhat offensive and as a result, in our view,
20 made a business decision to terminate the contract. In other
21 words, they chose not to affiliate with the Miss Universe
22 pageant and directly with Mr. Trump.

23 Your Honor, we certainly understand at a business
24 level why that decision might have been made by the powers that
25 be at Univision. However, actions have consequences. They

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1 chose knowingly to breach the contract. And it is our belief
2 that as a result of the termination of the agreement and their
3 decision not to air a Spanish language pageant, they violated
4 the terms of the contract and they're indebted to us for the
5 five-year term of the agreement at roughly 13 and a half
6 million dollars.

7 There are additional claims that are asserted in the
8 complaint, your Honor, multiple claims, all of which we believe
9 state a valid cause of action under New York law. Apparently,
10 Univision disagrees, and that's why we're here today.

11 THE COURT: What are the other claims?

12 MR. ROSEN: Yes, your Honor. Claims include breach of
13 the implied covenant of good faith and fair dealing, tortious
14 interference with contract, defamation claim, and a claim for
15 punitive damages and a claim for attorneys' fees.

16 THE COURT: I'm sorry, defamation, what after
17 defamation?

18 MR. ROSEN: I'm sorry, your Honor?

19 THE COURT: You said a claim for defamation and then
20 before attorneys' fees.

21 MR. ROSEN: Punitive damages. Your Honor, we
22 recognize and we do intend to clarify that the punitive damages
23 claim as it's asserted and the attorneys' fees are damages
24 elements of the breach of contract claim.

25 THE COURT: Right.

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1 MR. ROSEN: If your Honor may, on the defamation
2 claim, in the aftermath of the decision by Univision to not
3 proceed with the contract with Miss Universe, a senior level
4 executive at Univision thought that it would be prudent, for
5 reasons that we truly don't understand, to juxtapose a
6 photograph of Mr. Trump next to Dylann Roof. Dylann Roof, of
7 course, is the person who went into a church in Charleston,
8 South Carolina, and executed in cold blood nine members of that
9 church. That is a statement under New York law. The statement
10 by Univision is that Mr. Trump is a murderer or that he incites
11 others to commit murder.

12 We recognize, of course, your Honor, that that
13 statement might be susceptible to multiple interpretations
14 depending on who the reviewer is. That question ultimately, we
15 believe, is an issue of fact for a finder of fact.

16 THE COURT: Mr. Trump is not an individual plaintiff,
17 is he, in the case?

18 MR. ROSEN: Yes, your Honor.

19 THE COURT: Oh, he is. Yes, okay. So that's a claim
20 only by Mr. Trump?

21 MR. ROSEN: Correct.

22 THE COURT: All right. Let me listen to the defense
23 as to what the basis for the motion to dismiss is.

24 MR. ESTRADA: Thank you, your Honor.

25 As Mr. Rosen stated, we are here on a premotion

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1 conference. We previously had agreed with Mr. Trump's counsel
2 that we would agree on a schedule for the motion that has been
3 so ordered by the Part I judge, but the grounds as I will state
4 them are as follows.

5 There is defamation claim which rests on a reposting
6 on Instagram by a Univision executive of a side-by-side photo
7 of a similarly coiffed Trump and Dylann Roof. Mr. Trump, as
8 everybody knows, is running for President of the United States.
9 The complaint nowhere asserts what the actual defamatory
10 statement was. And under New York law, there would be no
11 reasonable view under which anybody would take this as a
12 statement of fact that Mr. Trump is a murderer. That itself
13 actually is not stated in the complaint.

14 At the very most, this is a parody of Mr. Trump's very
15 often parodied hairdo and of his political opinions, which as
16 somebody who is running for the President of the United States
17 is not at all unusual.

18 All of the statements that are or could be alleged to
19 be giving rise to defamation in this case are absolutely
20 protected by the New York and federal Constitution. That is at
21 the high level of the motion to dismiss on the defamation
22 claim.

23 Of course, Mr. Trump also claims damages for
24 defamation per se. There is no basis in the complaint for a
25 claim of defamation per se. He fails to plead any damages.

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1 His claim that this cost him \$500 million in damages is on its
2 face exorbitant, inexplicable, and certainly unexplained.

3 There is a claim for tortious interference with a
4 contract or contracts which, again, are not identified in the
5 complaint.

6 As you may know and as is obvious from the complaint
7 itself, in the aftermath of Mr. Trump's announcement for
8 President on June 16, there were a number of companies,
9 including Univision and NBC, that severed commercial
10 relationships with Mr. Trump and his businesses. Those
11 included Macy's, the City of New York, NASCAR, ESPN. It's a
12 fairly high number.

13 Notwithstanding all of that, the allegation of the
14 complaint is that there was some unspecified lobbying on the
15 part of Univision to convince NBC to drop its commercial
16 understandings with Mr. Trump. Just on the basic Iqbal/Twombly
17 level, there is an obvious possible explanation for the fact
18 NBC decided to cut its relationships with Mr. Trump, as did
19 many entities. But, in any event, there are no allegations in
20 the complaint as to what exactly it is that anybody at
21 Univision did, other than to say that upon information and
22 belief, there was some lobbying of NBC to drop Mr. Trump.

23 Again, I have a perfect right to urge as a citizen
24 anybody and everybody in the world to stop doing business with
25 Mr. Trump. That is again protected by the First Amendment.

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1 There is no allegation of any improper means used or coercion
2 or anything that New York law would recognize as a basis for a
3 tortious interference claim.

4 There is, as was mentioned, two contract claims. In
5 fact, one of them is completely redundant of the other. It's a
6 pleading of the covenant of good faith in a completely
7 redundant basis. But the basis in gross for the dismissal of
8 that claim is on the basis and on the face of the complaint,
9 Mr. Trump and Miss Universe -- if he in fact is authorized to
10 speak for Miss Universe, which is something I'm getting to
11 presently -- they disclose that the whole basis for the bargain
12 with Univision was to get the pageant to the Spanish speaking,
13 largely Mexican American audience of Univision.

14 When Donald Trump decided to start his presidential
15 bid by engaging in what was widely and reasonably perceived as
16 a racist rant against Mexican Americans, he himself destroyed
17 the value of the contract to Univision, frustrated its purpose,
18 and prevented the Univision network from being able to have a
19 first-class broadcast as was guaranteed in the contract.

20 There is a final claim for fees which, of course,
21 would fall with any claim under the contract. I should
22 clarify --

23 THE COURT: I'm sorry. There are two contract claims.
24 One is breach of contract. The defendant didn't abide by the
25 terms of the contract. The second is breach of the covenant of

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1 good faith and fair dealing. And the argument is what?

2 MR. ESTRADA: The argument on that is that under the
3 law, if the basis for the breach of the covenant of good faith
4 and fair dealing is identical, as it is in this case, for the
5 breach of the written contract, then that is merely an
6 additional argument for the claimed breach of contract but not
7 in itself a claim.

8 THE COURT: Okay. And the defense to the breach of
9 contract is?

10 MR. ESTRADA: Is frustration of purpose that appears
11 on the face of the complaint.

12 THE COURT: I'm sorry?

13 MR. ESTRADA: Frustration of purpose that appears on
14 the face of the complaint.

15 THE COURT: Can I really decide a motion to dismiss
16 that the straight breach of contract claim should be dismissed
17 on the basis of alleged frustration of purpose?

18 MR. ESTRADA: I would say yes, although it is
19 relatively rare, I recognize, your Honor. I will point out
20 that it is a very unusual case in which the plaintiff is
21 somebody who's subject to many judicially noticeable facts and
22 who himself has come into court pleading the contract terms and
23 the basis on which the contract was entered, which simply as a
24 matter of common sense established the defense of frustration
25 of purpose because the whole point of the contract, as admitted

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1 in the complaint, is to reach the largely Mexican American
2 audience that Univision has and the largely Hispanic audience
3 and to have a broadcast that will be tailored to the Spanish
4 speaking audience, none of whom would want to have anything to
5 do with Mr. Trump.

6 THE COURT: And I can decide frustration of purpose as
7 a matter of law based just on the pleading in the complaint?

8 MR. ESTRADA: And on judicially noticeable facts.
9 That would be our submission here. Obviously, we're not here
10 to argue the motion on its merits. But I believe that with
11 respect to the very allegations of the complaint and the nature
12 of Mr. Trump's current bid, the nature of the damage and of the
13 commercial relationship is fairly evident and this is a case in
14 which those matters are appropriate for a motion.

15 Believe me, I don't usually go into court and move to
16 dismiss on the basis of a defense, but it is also rare that
17 somebody comes into court and essentially pleads it for me.

18 THE COURT: You say relatively rare. Are there any
19 similar cases where a breach of contract claim has been
20 dismissed on such a basis?

21 MR. ESTRADA: I don't know that I can readily come up
22 with one at the moment. But we will have a briefing for you in
23 the motion, if you allow it, your Honor.

24 THE COURT: I can't prevent it, actually. Okay.

25 MR. ESTRADA: But there is a final overarching issue

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1 that also deals with this question. The contract claim, if
2 there is one, is one that belongs to Miss Universe. As the
3 complaint itself alleges, at the time of the filing of the
4 complaint, Mr. Trump was a minority partner in the joint
5 venture with NBC being the majority partner. There is a very
6 inadequate and completely conclusory allegation that demand on
7 Miss Universe would have been futile. So as to all the claims
8 but defamation, there's a question of authority.

9 I will say if you leave the face of the complaint, it
10 has been widely publicized that since the filing of the
11 complaint, Mr. Trump and NBC have resolved their differences --
12 this has been in the press -- and that as a result of the
13 resolution of those differences and the settlement, Mr. Trump
14 acquired the pageant and then sold it to somebody else.

15 And since we're here and since lack of authority would
16 actually extend to all claims but defamation, maybe this would
17 be a good opportunity for Mr. Rosen to advise the Court what
18 the basis of authority is on all counts but defamation.

19 THE COURT: Okay. All counts but the defamation?

20 MR. ESTRADA: Yes, because if there's no authority to
21 sue on behalf of Miss Universe, even putting aside whether we
22 have independent grounds on each claim, as we believe we do,
23 the question of authority would dispose of all claims but
24 defamation. And the Constitution, common sense, and basic law
25 would deal with the defamation question itself.

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1 THE COURT: Okay. Thank you.

2 Mr. Rosen.

3 MR. ROSEN: Yes, your Honor. To that point we do
4 acknowledge that the complaint needs to be cleaned up to
5 reflect the consolidation ostensibly of the parties. There's
6 no longer a need for a derivative claim. There has been a
7 financial transaction that has taken place and, clearly,
8 Miss Universe L.P., the named plaintiff, has full authority to
9 bring this action. And we will in very short order, your
10 Honor, be amending the complaint to reflect that.

11 THE COURT: Shouldn't you at least ask for permission?

12 MR. ROSEN: Your Honor, yes. I perhaps mistakenly
13 believed that we were within our as of right period.

14 THE COURT: You may well be. You may well be. But I
15 was going to give you the opportunity to amend in any event
16 because it makes no sense to have a motion to dismiss which
17 would be greeted by an application to deny the motion to
18 dismiss, or if I was inclined to grant the motion to dismiss,
19 to allow the plaintiff the opportunity to file an amended
20 complaint.

21 So you've heard the grounds that the defendant wants
22 to raise in response to the current complaint. Yes, I mean by
23 all means, you can file an amended complaint. And if the
24 defendants then file a motion to dismiss on the grounds that
25 they said that they intend to move to dismiss, I take it you

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1 will not then ask for leave to file yet another amended
2 complaint so that I write one opinion on the first motion to
3 dismiss, you then file an amended complaint, and I have another
4 motion to dismiss, right? You'll give me your best amended
5 complaint, right?

6 MR. ROSEN: Yes, your Honor. Absent any newly
7 discovered information, that's absolutely correct.

8 THE COURT: Okay. Let me go over some of the issues
9 that were raised on the purported motion to dismiss and from
10 what you've already said.

11 In your amended complaint you will explain what the
12 authority is to bring the complaint, right?

13 MR. ROSEN: Yes.

14 THE COURT: And you're going to drop any independent
15 claim for punitive damages or attorneys' fees. That's just
16 part of your *ad damnum*, right?

17 MR. ROSEN: Yes, your Honor.

18 THE COURT: Now, you've heard a detailed explanation
19 as to why you have no defamation claim. And I take it to the
20 extent that you think you have a defamation claim, you will
21 plead as much as possible as to why you have a defamation
22 claim. Yes?

23 MR. GOLDMAN: We will, your Honor. And I just want to
24 say to that point, if one of the bases for the lack of a
25 defamation claim is the argument that the posting to a mass

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1 murderer was solely because of hair style and having nothing to
2 do with mass murder, I don't think we need to address that.
3 But with respect to defamation per se, we will certainly be
4 addressing that.

5 THE COURT: All right.

6 With respect to tortious interference with contract,
7 you're talking about the defendants having tortiously
8 interfered with other contracts other than the contract which
9 is being claimed as breach of contract, right?

10 MR. ROSEN: That's correct, your Honor.

11 THE COURT: And the defendants say that claim doesn't
12 even survive under Iqbal and Twombly because there are no
13 specific allegations as to what the defendants did to interfere
14 with other specific contracts and that they used improper means
15 or otherwise improperly interfered with the other contracts.

16 And you say?

17 MR. ROSEN: Your Honor, Mr. Randy Falco, the president
18 of Univision at the time, previously worked for NBC. And the
19 timing of NBC's decision to not go forward with the pageant is
20 somewhat suspect given that just a day or two earlier they had
21 made --

22 THE COURT: But the tortious interference with
23 contract is not under the Univision contract.

24 MR. ROSEN: No, it's on the NBC arrangement with
25 Trump. And, your Honor, there the issue is that Mr. Trump, the

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1 individual, his views on immigration were well-known before
2 this contract was entered into with Univision. It should not
3 have come as any surprise. It became an issue for Univision,
4 of course, when he announced he's running for President.

5 NBC's original response to this was, look, Mr. Trump
6 has his personal views and we don't agree with them, those are
7 his views, and it is what it is. And then, lo and behold, we
8 believe, Mr. Falco used some of his connections and some of his
9 relationships that had developed, not to mention the fact that
10 he had access to a demographic that was very important to NBC,
11 and we believe there was some coercion and we believe that
12 there was some suggestions that NBC not do business with Trump.

13 I believe that we have enough, your Honor, to show
14 malice, which is an element of a tortious interference with
15 contract claim, and also economic duress would satisfy at least
16 for pleading purposes.

17 THE COURT: The argument on the other side is that
18 there are no factual allegations to show that Univision
19 actually used its influence it had with NBC to get NBC to act
20 in any way. Now, you say, well, if it did, then it was
21 malicious and you can satisfy the other elements for the tort.
22 But the argument on the other side is there are insufficient
23 factual allegations to support a plausible conclusion that in
24 fact Univision was doing that.

25 And so there certainly is at least a question why you

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1 want to delay the case on breach of contract by adding other
2 claims which invite a motion to dismiss. Maybe the motion to
3 dismiss would come in any event, but I just raise it with you.
4 All I have is what the parties have told me in connection with
5 this conference, although I haven't heard the factual basis for
6 the belief that Univision was doing something vis-a-vis NBC,
7 which certainly has a substantial presence, that it doesn't
8 need Univision to tell it what to do, so.

9 MR. ROSEN: Your Honor, we are at a bit of a
10 disadvantage in that we were not privy to any of the
11 conversations that we believe took place between Mr. Falco and
12 senior executives at Univision. Now, hypothetically, if there
13 were emails out there or phone calls that were made or
14 discussions, that would be evidence supporting our claim. We
15 just find it very suspect, the timing. NBC took a position and
16 then quickly reversed that position.

17 THE COURT: Well, you're going to file an amended
18 complaint. One would suspect that the standard for pleading a
19 plausible claim is we find it suspicious. So I don't decide
20 anything until it's briefed on the facts and the law. You're
21 going to file an amended complaint. There will surely be a
22 motion to dismiss. The more claims, the longer the motion to
23 dismiss, the longer it takes to decide.

24 There is then the issue of whether there's an
25 independent breach of the implied covenant of good faith and

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1 fair dealing as an independent claim, which is something you
2 should look at because there are lots of cases which dismiss
3 such a claim at the outset as duplicative of the claim of
4 breach of contract. There certainly is a breach of implied
5 covenant of good faith and fair dealing, but there are many
6 cases which say if there's a breach of contract claim, the
7 breach of implied covenant of good faith and fair dealing is
8 duplicative because you have to interpret the contract with the
9 covenant of good faith and fair dealing. Okay.

10 MR. ESTRADA: Your Honor, may I, solely in aid of the
11 Court's purpose of just going through this exercise once and in
12 partial response to statements by counsel on the defamation, I
13 just want to make clear that it is not our position solely that
14 a reasonable person would view this as a parody of Mr. Trump's
15 hair. It is that there is no identifiable statement of fact,
16 that it is at most an opinion on his hair, his views, or a
17 parody of the man, it doesn't really matter, and the First
18 Amendment and the New York constitution make it fully
19 protected.

20 THE COURT: Was there any printing that went along
21 with the juxtaposition of the two photos?

22 MR. ESTRADA: There is a text on top of them that says
23 "no comment."

24 And solely on the point of Iqbal, again, I will point
25 out that I don't need to gild the lily on the plausibility.

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1 And the whole point of Twombly and Iqbal was to preclude the
2 fishing expedition of "we don't know but we suspect" and to cut
3 it off at the motion to dismiss.

4 There is another issue that is part of that claim that
5 should be brought up now and it is that they have settled with
6 NBC according to public reports. If they don't know now, I
7 don't know what else they're going to find out.

8 THE COURT: I doubt that I could take that into
9 account on a motion to dismiss. I mean whether they settled
10 with NBC, what the terms of that settlement were, all of that
11 would seem to go far beyond the complaint.

12 MR. ESTRADA: Well, we'll see what the complaint if
13 refiled says. I was mentioning it in aid of a further point
14 which is that on question of law, if that is either in the
15 complaint or judicially noticeable, that would bear on whether
16 the complaint apart from the factual failings establishes a
17 claim as a matter of law because they settled the claim that
18 allegedly gives source to the damage.

19 THE COURT: Okay.

20 MR. GOLDMAN: Your Honor, if I may, we will certainly
21 with the Court's guidance amend the complaint with the idea
22 being we're not trying to engage in unnecessary motion
23 practice. I would hope that defendants' counsel listening to
24 your Honor with respect to frustration of purpose because in
25 New York, if what is said is foreseeable, it's a complete

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1 defense to that. And Mr. Trump many times well before the
2 contract was signed with Univision had an opinion that was
3 somewhat similar if not identical to his opinion that he
4 enunciated when he announced for his presidency. There was no
5 morals clause. They were free not to enter into that
6 agreement.

7 So when counsel says that your Honor could take
8 "judicially noticeable facts" with respect to Mr. Trump, it's
9 those judicially noticeable facts that make the frustration of
10 purpose inapplicable because it was completely reasonable for
11 Univision to have suspected that and hopefully that won't be
12 one aspect of the motion.

13 THE COURT: Okay. When do you want to file your
14 amended complaint?

15 MR. ROSEN: Within two weeks, your Honor, if that
16 would be acceptable.

17 THE COURT: That's fine. Sure.

18 So amended complaint November 6.

19 Time to answer or move with respect to the amended
20 complaint is?

21 MR. ESTRADA: We would ask for 20 days, your Honor.

22 THE COURT: That's fine.

23 MR. ESTRADA: We previously had a stip, and with
24 respect to their response to our motion, we're happy to stand
25 by the stipulation and give them 45 days as previously agreed.

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1 THE COURT: Whoa.

2 MR. ESTRADA: If they need it.

3 THE COURT: So 45 days to respond. No, they don't
4 need that.

5 So the amended complaint November 6.

6 The answer or move by November 30 --

7 MR. ESTRADA: Excuse me, your Honor.

8 THE COURT: -- which is a Monday. It's the Monday
9 after Thanksgiving. The 26th is Thanksgiving.

10 And response to any motion to dismiss?

11 MR. ESTRADA: Your Honor, if I could have a plea to
12 reconsider at the urging plea of somebody who needs to be
13 involved and won't be available for Thanksgiving, if we could
14 have an extra week to take the holiday into account.

15 THE COURT: Not a problem.

16 So answer or move by December 4.

17 Response to any motion to dismiss?

18 MR. GOLDMAN: Your Honor, we had stipulated and I
19 believe your Honor so ordered I think it was 45 days.

20 MR. ESTRADA: Forty-five days.

21 MR. GOLDMAN: We don't need 45 days. We can do it in
22 30 days, your Honor.

23 MR. ESTRADA: But we stand by our bargains on that,
24 your Honor.

25 THE COURT: Sure.

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1 Response to any motion to dismiss, January 8, 2016.

2 And then the reply?

3 MR. ESTRADA: If we could ask for two weeks, that
4 should be enough, your Honor.

5 THE COURT: January 22.

6 Okay. I'll enter an order which puts in that
7 schedule.

8 Anything else?

9 MR. ESTRADA: Nothing for the defense, your Honor.

10 MR. ROSEN: Nothing for the plaintiff, your Honor.
11 Thank you.

12 THE COURT: Good to see you all.

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